Terry Revisited and the Law of Stop-and-Frisk in Texas

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COMMENT

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In *Terry v. Ohio*[1] the United States Supreme Court recognized the right of law enforcement officials to stop and frisk. The case marked the first time that the Supreme Court directly sanctioned a government intrusion upon the private citizen with justification which amounted to less than probable cause to arrest or search.[2] Because of this, commentators have noted the potential for misapplication of the ruling, some stating that *Terry* expanded governmental authority to search.[3] Indeed, since 1968 the decision has been widely employed to uphold convictions in cases with fact situations ranging from airport hijacking searches[4] to searches of automobiles incident to arrests for minor traffic violations.[5] On the other hand, any discussion of Texas developments in the law of stop-and-frisk prior to 1972 will prove to be brief. Under *Terry*, the authority to stop and frisk is clearly present, but there have been few decisions by the Court of Criminal Appeals of Texas dealing with the procedure. However, recent opinions by the court do indicate an increased awareness of the *Terry* holding.[6]

This Comment will attempt to focus upon three fundamental areas: the impact of *Terry* on governmental authority to conduct searches and seizures under the fourth amendment; the development of stop-and-frisk doctrine in the context of Texas jurisprudence; and the effect certain recently decided cases may have upon *Terry*'s holding and the law of stop-and-frisk in Texas.[7]

I. IN THE BEGINNING: TERRY AND SIBRON

The 1960's were marked by a tremendous expansion of case law defining the limits of governmental searches and seizures under the fourth amendment of

[1] 392 U.S. 1 (1968). Companion cases to *Terry* decided the same day were *Sibron v. New York* and *Peters v. New York*. The opinions in *Sibron* and *Peters* were consolidated for discussion of New York's stop-and-frisk statute. 392 U.S. 40 (1968). *See* notes 34-35 *infra*, and accompanying text.

[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ." U. S. CONST. amend. IV. *See also* TEX. CONST. art. I, § 9. The Supreme Court of the United States has stated that "[p]robable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." Henry v. United States, 361 U.S. 98, 102 (1959).

The fourth amendment requirement that probable cause exist in order for a search or arrest warrant to be issued extends to warrantless arrests and searches as well. *See* Beck v. Ohio, 379 U.S. 89 (1964); Worthington v. United States, 166 F.2d 557 (6th Cir. 1948).

[3] Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA. L. REV. 287, 300 (1971); Landynski, *The Supreme Court's Search for Fourth Amendment Standards: The Problem of Stop-and-Frisk*, 45 CONN. B.J. 146, 184 (1971).

[4] United States v. Moreno, 475 F.2d 44 (5th Cir. 1973); United States v. Riggs, 347 F. Supp. 1098 (E.D.N.Y. 1971); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971).

[5] Corbitt v. State, 445 S.W.2d 184 (Tex. Crim. App. 1969).

[6] *See, e.g.*, Brown v. State, 481 S.W.2d 106 (Tex. Crim. App. 1972); Baker v. State, 478 S.W.2d 445 (Tex. Crim. App. 1972). *See generally* note 112 *infra*, and accompanying text.

[7] Adams v. Williams, 407 U.S. 143 (1972); Talbert v. State, 489 S.W.2d 309 (Tex.

the Constitution.[8] Despite this expansion, commentators often noted the paucity of constitutional guidelines authorizing a police officer to stop, question, and frisk a private citizen where inadequate grounds for an arrest or search existed.[9] In 1968 the Supreme Court was directly confronted with this issue in the now-famous classic stop-and-frisk factual situation in *Terry v. Ohio*.[10] A police officer's attention was attracted to the activities of two men directly across the street from him in downtown Cleveland. One suspect would walk in front of a store window, stop and peer inside, and then continue walking ahead. At a certain point down the street he would turn around and walk back to join his companion, stopping to stare into the same store again. His companion would then follow the same procedure. The two suspects repeated the ritual about a dozen times (apparently "casing" the store for a potential robbery attempt). A third man then joined the pair, conferred with them, and walked away. The two suspects waited momentarily before following the third man. By this point, the officer was highly suspicious of these activities, and he pursued and confronted the three men at a point two blocks down the street from the subject store. He identified himself as a police officer and asked for their identification. When they failed to give a coherent reply, the officer spun defendant Terry around, patted him down, and felt a pistol which he removed from his pocket. Terry was subsequently convicted for carrying a concealed weapon.

In considering whether the officer's conduct was reasonable, the Supreme Court acknowledged that no probable cause to arrest had existed, but felt that the street confrontation situation required a balancing of society's needs to detect and prevent crime with the constitutional protections forbidding unreasonable searches and seizures.[11] The Court first determined that stop-and-frisk procedures are governed by fourth amendment standards, rejecting the state's argument that they represent lesser intrusions upon the person than full-blown searches and seizures. Applying a fourth amendment test of reason-

Crim. App. 1973); Brown v. State, 481 S.W.2d 106 (Tex. Crim. App. 1972). *See generally* notes 100-20 *infra*, and accompanying text.

[8] *E.g.*, Katz v. United States, 389 U.S. 347 (1967) (eavesdropping upon the defendant's conversation in a telephone booth is an unreasonable search and seizure under the fourth amendment); Camara v. Municipal Court, 387 U.S. 523 (1967) (searches by municipal administrative agencies require a search warrant where an inspector is refused entry); Warden, Md. Penitentiary v. Hayden, 387 U.S. 364 (1967) (warrantless search for weapons and items of evidentiary value is permissible where police are in "hot pursuit" of a fleeing felon); Preston v. United States, 376 U.S. 364 (1964) (a search of an automobile incident to an arrest must be contemporaneous in time and at the same location as the arrest); Mapp v. Ohio, 367 U.S. 643 (1961) (all evidence obtained as a result of an unconstitutional search and seizure is inadmissible in state criminal proceedings); Jones v. United States, 362 U.S. 257 (1960) (any person legally on the premises where a governmental search has occurred has standing to question the validity of the search).

[9] *See generally* Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093 (1967); Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62 (1966); Kuh, *In-Field Interrogation: Stop, Question, Detention and Frisk*, 3 CRIM. L. BULL. 597 (1967); LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331; Oberman & Finkel, *Constitutional Arguments Against "Stop and Frisk,"* 3 CRIM. L. BULL. 441 (1967); Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966); Stern, *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. L.C. & P.S. 532 (1967).

[10] 392 U.S. 1 (1968).

[11] *Id.* at 21-22.

ableness, the Court found that the officer's actions were reasonable in light of the circumstances, and noted the law enforcement official's need for a variety of appropriate responses for the many different situations which confront him in the course of his law enforcement duties.[12] The majority held that a policeman may reasonably detain and question a citizen for the purpose of investigating suspected criminal activity in appropriate circumstances, where probable cause to arrest may be lacking. If, during the course of the investigation, the police officer finds reason to believe that the suspect is armed and dangerous, and that his or others' safety may be jeopardized, the Court stated that the policeman may conduct a pat-down of the outer clothing of the suspect to discover weapons which might be used to assault him.[13]

Thus, reasonableness, not probable cause, was thereafter to be the guideline in determining the constitutionality of a policeman's conduct in stop-and-frisk situations. To justify a particular governmental intrusion upon a person or his property, the Court stated that the policeman "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[14] The majority, no doubt searching for something more tangible to guide police conduct in that less-than-probable-cause grey area, formulated an "objective standard" against which the facts surrounding the circumstances might be judged: "Would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate . . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction."[15]

The Court stated that a reviewing court must be guided by a bifurcated reasonableness test in applying their holding in *Terry*: First of all, a court must review the facts and ask whether the facts warranted the *intrusion* upon the individual's fourth amendment rights. Secondly, a court must review whether the *scope* of such an intrusion was reasonably related to the circumstances which justified the interference in the first place.[16] For instance, the scope of the frisk of the defendant Terry by the police officer was found to be reasonable by the Court, pointing to the facts that the officer did not place his hands beneath the outer garments of the defendant and his companions until he felt a weapon. This procedure, according to the Court, was not a "general exploratory search for whatever evidence of criminal activity he might find," but rather a limited search confined "strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons."[17] The net effect of the holding in *Terry* was the granting to policemen the authority to make a seizure and conduct a limited search in factual circumstances which would be inadequate to warrant the issuance of a search or arrest warrant. This fact, along with the consequent

[12] *Id.* at 10.
[13] *Id.* at 28-30.
[14] *Id.* at 21.
[15] *Id.* at 21-22.
[16] *Id.* at 20.
[17] *Id.* at 30.

fears of resultant unbridled police discretion in street confrontations, was voiced in the dissenting opinion by Justice Douglas.[18] Indeed, *Terry* did mark an extreme departure from a long-standing premise of the Court that the absence of a warrant would not of itself grant greater authority to the police in conducting searches and seizures.

In the companion case of *Sibron v. New York*[19] the Court applied its holding in *Terry* to a similar fact situation, and thereby demonstrated what it considered to be an unreasonable stop-and-frisk. A police officer walking his beat had observed the defendant Sibron conversing with six or eight known narcotics addicts. The officer later observed Sibron in a restaurant talking with three more known addicts. He approached Sibron in the restaurant, asked him to step outside and said, "You know what I am after." Sibron mumbled something and put his hand into his pocket; the officer thrust his hand into Sibron's pocket and pulled out containers of heroin. The Court held that the officer's actions constituted an unreasonable, and thereby unlawful, search, and not a frisk for weapons; therefore, probable cause was required to search the suspect. The Court determined that the officer in *Sibron* was clearly seeking narcotics rather than acting for his own safety.

II. THE LAW OF STOP-AND-FRISK IN TEXAS

In the five years following *Terry* many jurisdictions have developed a sizable body of case law in the stop-and-frisk area,[20] while a number of states have granted authority and created guidelines for policemen through legislation.[21] In Texas, no such stop-and-frisk statute exists, and until 1973 only one decision of the Court of Criminal Appeals of Texas dealt specifically with the reasonableness of an on-the-street detention of a suspect in circumstances where less than probable cause existed to make an arrest.[22] The broad statutory

[18] *Id.* at 35-39. *See generally* Henry v. United States, 361 U.S. 98 (1959); McDonald v. United States, 335 U.S. 451, 455-56 (1948); Johnson v. United States, 333 U.S. 10, 13-15 (1948); Carroll v. United States, 267 U.S. 132, 156, 161-62 (1925).

[19] 392 U.S. 40 (1968).

[20] *E.g.*, The California Supreme Court, even prior to *Terry*, had authorized a "stop" of a suspect under certain circumstances. People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963). *See also* People v. Collins, 1 Cal. 3d 658, 463 P.2d 403, 83 Cal. Rptr. 179 (1970); People v. Cruppi, 265 Cal. App. 2d 9, 71 Cal. Rptr. 42 (1968). Other states also held the "stop" to be constitutional within defined limits. *See* Cannon v. State, 53 Del. 284, 168 A.2d 108 (1961); DeSalvatore v. State, 52 Del. 550, 163 A.2d 244 (1960); State v. Gulczynski, 32 Del. 120, 120 A. 88 (1922); Commonwealth v. Matthews, 355 Mass. 378, 244 N.E.2d 908 (1969); Commonwealth v. Lehan, 347 Mass. 197, 196 N.E.2d 840 (1964); People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964); People v. Joslin, 32 App. Div. 2d 859, 301 N.Y.S.2d 212 (1969); Commonwealth v. Clarke, 219 Pa. Super. 340, 280 A.2d 662 (1971); Commonwealth v. Berrios, 437 Pa. 338, 263 A.2d 342 (1970); Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969); Kavanagh v. Stenhouse, 174 A.2d 560 (R.I. 1961), *appeal dismissed*, 368 U.S. 516 (1962) (per curiam).

[21] *E.g.*, ILL. REV. STAT. ch. 38, § 108-1.01 (1970); LA. CRIM. PROC. ANN. art. 215.1 (Supp. 1972); N.Y. CRIM. PROC. LAW § 140.50 (McKinney Supp. 1972). These statutes are essentially codifications of the holding in *Terry*. *See also* CAL. PEN. CODE § 833 (1970); DEL. CODE ANN. tit. 11, §§ 1902 (Supp. 1970), 1903 (1953); MASS. GEN. LAWS ANN. ch. 41, § 98 (Supp. 1973); N.H. REV. STAT. ANN. §§ 594:2, 594:3 (1955); R.I. GEN. LAWS ANN. § 12-7-1 (1956).

[22] Baity v. State, 455 S.W.2d 305 (Tex. Crim. App.), *cert. denied*, 400 U.S. 918 (1970); *see* Hensley v. State, 494 S.W.2d 816 (Tex. Crim. App. 1973). Even in those Texas cases whose factual situations properly call for application of *Terry*'s holding, the court has gen-

authority granted a Texas peace officer to arrest without benefit of a warrant may be a principal reason for the absence of Texas case authority dealing with stop-and-frisk. If a lawful arrest without warrant is made, a search incidental and contemporaneous to that arrest for weapons and items of evidentiary value may be conducted,[23] although the scope of the search must be reasonable within fourth amendment standards.[24] Article 14.01 of the Texas Code of Criminal Procedure sets out the general statutory authority for an arrest without a warrant.[25] However, such authority is by no means limited to article 14.01; for example, provisions in the Texas Penal Code concerning the unlawful sale or possession of alcoholic beverages[26] and violations of the Motor Vehicle Act[27] grant similar authority to peace officers.

More relevant in the context of stop-and-frisk is article 14.03 of the Code of Criminal Procedure which authorizes a peace officer to make a warrantless arrest of any persons "found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws."[28] Many convictions in Texas have been based wholly or partially on article 14.03 or its predecessors.[29] However, serious questions must be raised concerning article 14.03's constitutional validity. First, the provision, read literally, gives Texas peace officers authority to arrest in circumstances which the Supreme Court in *Terry* had decreed would only be appropriate for an investigative stop. In other words, article 14.03 seems to grant authority to

erally relied on other authority to justify the peace officer's conduct. For instance, in Sanchez v. State, 438 S.W.2d 563 (Tex. Crim. App. 1969), a highway patrolman stopped an automobile driving away from a warehouse late at night. The suspects refused to answer any questions. The patrolman searched their persons and discovered marijuana. The court held that the search was valid as incident to an arrest authorized by TEX. CODE CRIM. PROC. ANN. art. 14.03 (Supp. 1972). *See* notes 28-29 *infra*, and accompanying text. *See also* Lara v. State, 469 S.W.2d 177 (Tex. Crim. App. 1971), *cert. denied*, 404 U.S. 1040 (1972).

[23] Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Beck v. Ohio, 379 U.S. 89 (1964); Preston v. United States, 376 U.S. 364 (1964).

[24] *E.g.*, in Chimel v. California, 395 U.S. 752, 763 (1969), the Court delineated the boundaries of a search incident to the arrest of the defendant in his own home, deciding that after the arrest it was reasonable for the officers to search only the person and immediate surrounding area of the arrestee for weapons and items of evidentiary value in order to prevent harm to the officers and insure that evidence will not be destroyed. *See also* Vale v. Louisiana, 399 U.S. 30 (1970).

[25] TEX. CODE CRIM. PROC. ANN. art. 14.01 (Supp. 1972) states that the peace officer has authority to arrest without warrant for a felony, an offense against the public peace, or for any offense, committed in his presence or within his view.

[26] TEX. PEN. CODE ANN. art. 666-4 (1952).

[27] *Id.* art. 803 (1964).

[28] TEX. CODE CRIM. PROC. ANN. art. 14.03 (Supp. 1972). *See* Comment, *The Law of Arrest in Texas*, 17 BAYLOR L. REV. 303, 306 (1965).

A statute similar in scope to article 14.03 is TEX. CODE CRIM. PROC. ANN. art. 2.24 (Supp. 1972), which provides that a police officer, whenever he believes a crime has been committed, may stop any person he reasonably believes was present at the commission and demand identification. Failure or refusal to answer to the officer's satisfaction may be followed by confining the suspect in jail "until he so identifies himself." The city of Dallas has a similarly worded ordinance. DALLAS, TEXAS, REV. CODE § 31-61 (1960).

[29] *E.g.*, Wallace v. State, 467 S.W.2d 608 (Tex. Crim. App. 1971); Broom v. State, 463 S.W.2d 220 (Tex. Crim. App. 1970), *cert. denied*, 402 U.S. 933 (1971); Alaniz v. State, 458 S.W.2d 813 (Tex. Crim. App. 1970); Stuart v. State, 447 S.W.2d 923 (Tex. Crim. App. 1969); Carter v. State, 445 S.W.2d 747 (Tex. Crim. App. 1969); Cox v. State, 442 S.W.2d 696 (Tex. Crim. App. 1969); Sanchez v. State, 438 S.W.2d 563 (Tex. Crim. App. 1969); Laube v. State, 417 S.W.2d 288 (Tex. Crim. App. 1967); Chambler v. State, 416 S.W.2d 826 (Tex. Crim. App. 1967); Roach v. State, 398 S.W.2d 560 (Tex. Crim. App. 1966).

arrest on suspicion, thereby violating the requirement that probable cause exist in order for an arrest to be constitutionally valid.[30] Secondly, the statute may be too vague and indefinite to withstand constitutional attack.

The Supreme Court has held that criminal legislation must provide ascertainable standards of guilt so that individuals will be given fair notice that their conduct is considered criminal by law.[31] For example, in 1972, the Supreme Court held in *Papachristou v. City of Jacksonville*[32] that a vagrancy ordinance was void for vagueness under the fourteenth amendment. Because the ordinance was so vague that the average citizen would be unable to determine when he was committing an offense, procedural due process was held to be denied. The ordinance was also found to be too vague in that it permitted police to make arbitrary arrests based upon mere suspicion. Scrutiny of article 14.03 in light of this decision indicates that it fails to meet these constitutional standards.[33] Because of its lack of protective guidelines to insure due process, the provision seems to sanction unbridled police discretion to arrest.

Of course, the constitutionality of a statute on its face has been found not to be the sole determinant of its constitutional validity. In *Sibron v. New York*[34] both parties argued that the principal issue before the Court was the constitutionality of New York's stop-and-frisk statute, a statute similar in scope to Texas' article 14.03. The Court declined to rule on the validity of the statute, noting that the conduct which a statute authorizes is more relevant in a determination of its constitutionality than the language on its face. The validity of a warrantless search, it was noted, is to be decided in the "concrete factual context of the individual case" considered in relation to the fourth amendment's reasonableness standard.[35] Therefore, an attack upon article 14.03's validity must be grounded upon allegedly unconstitutional police conduct squarely authorized by the statute. And, the fact that the arrest is often further justified by statutory authority in addition to article 14.03 makes the burden upon one directly attacking the provision heavier still.[36]

III. APPLICATION AND MISAPPLICATION OF TERRY

Despite the majority's attempts in *Terry* to confine the scope of the issue

[30] 405 U.S. 156 (1972). *See also* Baker v. State, 478 S.W.2d 445 (Tex. Crim. App. 1972), in which the court of criminal appeals, following *Papachristou,* ruled that the city of Lubbock's vagrancy ordinance was unconstitutionally vague and indefinite.

[31] *See* note 2 *supra.*

[32] *See* Winters v. New York, 333 U.S. 507 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[33] The constitutionality of article 14.03's predecessors was upheld before the court of criminal appeals. *See* Purdy v. State, 159 Tex. Crim. 154, 261 S.W.2d 850 (1953); Crippen v. State, 80 Tex. Crim. 293, 189 S.W. 496 (1916).

[34] 392 U.S. 40 (1968).

[35] *Id.* at 59-62; *see* Colvin, *Criminal Law and Procedure,* 23 Sw. L.J. 223, 224-25 (1969).

[36] *E.g.,* in Lara v. State, 469 S.W.2d 177 (Tex. Crim. App. 1971), *cert. denied,* 404 U.S. 1040 (1972), both article 14.01 and article 14.03 of the Code of Criminal Procedure were used to justify the suspect's arrest. *See also* Wallace v. State, 467 S.W.2d 608 (Tex. Crim. App. 1971); Alaniz v. State, 458 S.W.2d 813 (Tex. Crim. App. 1970); Cox v. State, 442 S.W.2d 696 (Tex. Crim. App. 1969). Article 14.03 is said to pertain to the "environment" surrounding the arrest when it is implemented with other arrest authority. Likewise, its usage by Texas law enforcement officers is said to be quite restricted due to the possibilities that it carries for false arrest. Interview with W. Westmoreland, District Attorney's office of Dallas County, Texas, in Dallas, Jan. 2, 1973.

presented to the Court,[37] Justice Douglas in his dissent in *Terry* expressed fears that the constitutional guarantees of the fourth amendment would be watered down as a result of the opinion.[38] While subsequent case law has not reflected any major upheaval, *Terry* has had a noticeable impact in certain areas of criminal jurisprudence in Texas and in other jurisdictions.

A. Detention and Investigation of the Suspect

A temporary detention of a suspect for further investigation prior to *Terry* would have arguably constituted an arrest.[39] *Terry*, however, constitutionally sanctioned a reasonable detention in circumstances where probable cause to make an arrest did not exist, thereby allowing courts to be less stringent regarding review of the "stop" stage in police investigation procedures. One author has noted that *Terry*'s impact already has been felt in cases upholding temporary detentions which would have before caused "considerable 'constitutional jitters.' "[40]

Two cases handed down by United States Courts of Appeals exemplify this broadened authority. In *United States v. Saldana*[41] two agents of the Border Patrol were maintaining traffic surveillance at a terminal of an Oklahoma turnpike to apprehend illegal aliens.[42] They observed a camper-pickup truck stopped at the toll gate with three occupants "of Mexican descent" in the front seat, and asked the driver, Saldana, to pull over to a nearby parking area. The agents then questioned the three and ascertained that Saldana's passengers were illegal aliens from Mexico. The aliens were placed under arrest. A search of the camper revealed twelve additional illegal aliens, whereupon Saldana,

[37] *Terry*'s basic issue was viewed quite narrowly by the Court: "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest." 392 U.S. at 15.

[38] *See* note 18 *supra*, and accompanying text.

[39] *E.g.*, Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959). Both cases held that the detentions of the defendants and subsequent searches of their automobiles were invalid under the fourth amendment. The Court found that the "stops" were in reality arrests, and were invalid because probable cause was lacking.

[40] Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA. L. REV. 287, 300 (1971). *See, e.g.*, Gaines v. Craven, 448 F.2d 1236 (9th Cir. 1971); United States v. Unverzagt, 424 F.2d 396 (8th Cir. 1970). In *Gaines* a policeman received an unconfirmed tip that narcotics were being sold by the defendant. The policeman stopped the defendant leaving his apartment, whereupon the frightened defendant attempted to throw a package back inside the apartment. A search of the package revealed that it contained narcotics. The Ninth Circuit, relying on *Terry*, held that a well-founded suspicion was all that was necessary to detain the defendant for an unlimited inquiry. In *Unverzagt* the Eighth Circuit upheld the "seizure" of the defendant by federal authorities in the men's room of a tavern. The court stated that although no probable cause to arrest existed, under *Terry* the officers had a limited right to stop a suspect for investigation.

[41] 453 F.2d 352 (10th Cir. 1972); 1972 UTAH L. REV. 109; *accord*, United States v. Granado, 453 F.2d 769 (10th Cir. 1972).

[42] It must be noted that border searches by their very nature comprise a necessary exception to fourth amendment search-and-seizure requirements. While probable cause to search is not required, border searches are governed by the fourth amendment's reasonableness requirement. *See, e.g.*, Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967); Blefare v. United States, 362 F.2d 870 (9th Cir. 1966); King v. United States, 258 F.2d 754 (5th Cir. 1958), *cert. denied*, 359 U.S. 939 (1959). However, where a checkpoint for illegal aliens is manned a "reasonable distance" from a United States border (usually interpreted as 100 miles), as in *Saldana*, the agent's conduct is no longer governed by border search standards. 8 U.S.C. § 1357(a)(3) (1970). The government in these instances must establish that the search was based on probable cause. *See, e.g.*, Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970); United States v. Winer, 294 F. Supp. 731 (W.D. Tex. 1969).

an American citizen, was arrested and charged with knowingly transporting aliens illegally in the United States. The trial court held that the stopping of the vehicle itself constituted an arrest without probable cause, and the subsequent search was thereby illegal. The court of appeals reversed and relied on *Terry* to justify the stop. The court found the initial stop not to be an arrest, but a "reasonable and routine discharge" of the agents' duties. It must be noted, however, that while the opinion in *Terry* referred to specific conduct arousing suspicion of criminal activities in justifying the stop,[43] the initial inquiry in *Saldana* was based upon no more than the presence of Mexican-Americans travelling on the highways. It is questionable whether this observance alone would lead one "reasonably to conclude . . . that criminal activity may be afoot," as *Terry* required.[44]

In conjunction with determining whether the investigatory stop in *Saldana* was reasonable, it is interesting to compare *Saldana* with the Ninth Circuit decision of *United States v. Mallides*.[45] There, two police officers patrolling in an area of Oceanside, California, heavily populated by Mexican-Americans, spotted a car occupied by six males appearing to be of Mexican-American descent. As the car passed the patrol car, the officers noticed that the occupants were sitting erect and that they did not turn to look at the patrol car as it passed. The officers thereupon pursued and stopped the car, which the defendant Mallides was driving. Upon investigation the officers discovered that Mallides' passengers were illegal aliens. The Ninth Circuit overturned the conviction, finding the initial stop to be illegal because it was based solely upon the officers' unsupported intuition and not upon specific and articulable facts. "Tested by any objective standard," the Court stated, "there is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious simply because the skins of the occupants are nonwhite or because they sit up straight or because they do not look at a passing police car."[46]

Saldana serves to illustrate a problem which originated with the opinion in *Terry*: the Court failed to define precisely the proper standards for when a "stop" for investigation is constitutionally permissible. Case authority is not lacking which outlines the standards constituting the "probable cause" necessary to justify a warrantless arrest; for example, a mere suspicion or belief has long been held to be an inadequate ground.[47] To achieve a similar standard, writers have felt that the Court in *Terry* should have defined the "level of suspiciousness" that should exist in order for a police officer to stop and investigate a suspect.[48]

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[43] 392 U.S. at 27.

[44] *Id.* at 30. *Terry* noted the possibilities for "wholesale harassment" of minority groups by "certain elements" of a police force through stop-and-frisk tactics, and warned that courts would be ever vigilant against such harassing tactics. *Id.* at 14-15.

[45] 473 F.2d 859 (9th Cir. 1973).

[46] *Id.* at 861.

[47] *E.g.*, Beck v. Ohio, 379 U.S. 89 (1964); Henry v. United States, 361 U.S. 98 (1959); Pace v. Beto, 469 F.2d 1389 (5th Cir. 1972); Ortiz v. United States, 317 F.2d 277 (5th Cir. 1963); United States v. Winer, 294 F. Supp. 731 (W.D. Tex. 1969); Brown v. State, 481 S.W.2d 106 (Tex. Crim. App. 1972); Gonzales v. State, 131 Tex. Crim. 15, 95 S.W.2d 972 (1936).

[48] Some writers have offered their own suggestions of what this precise criterion should be. For instance, one author proposed that the proper standard be "a substantial possibility

Saldana and *Mallides* further serve to illustrate the expansion of the *Terry* decision's ruling. A narrow reading of *Terry* seems to reflect the Court's feelings that the use of investigatory detention procedures in instances where probable cause is lacking should be limited to on-the-street pedestrian-policeman confrontations.[49] However, a study of case history since 1968 reveals that the *Terry* rationale has been applied to investigatory detentions of occupants of automobiles as well.[50] While the Supreme Court has never directly ruled upon whether *Terry*'s holding regarding reasonable detentions is properly applicable to stops of automobiles, it seems that the situations usually surrounding both the pedestrian and the automobile occupant are analogous enough to merit the same treatment.[51] In *Carpenter v. Sigler*[52] the Eighth Circuit strictly applied *Terry*'s dual reasonableness test,[53] and upheld the actions of police officers in stopping an automobile in a small Nebraska town late at night. The suspects had been followed by the officers as they pursued an erratic course through the town, passing slowly past certain business establishments in an area in which many burglaries had recently occurred. The officers stopped the auto and asked the suspects to get out of the car for identification purposes. While emerging from the automobile, one of the suspects struck an object protruding from beneath the front seat. The officer shined his flashlight onto the floor of the car and spotted a crowbar and burglary tools. The auto was then fully searched and the occupants were placed under arrest. The court found that the facts and all reasonable inferences presented to the officers justified their initial intrusion. The scope of the intrusion in forcing the occupants to get out of the automobile was likewise found to have been reasonable because of the darkness and the possibility that the occupants might have been concealing a weapon out of sight.[54]

Generally, the detention of a suspect has been upheld where objective facts have existed to sustain the officer's conclusions that criminal activity may be afoot.[55] However, when the detention is based upon nothing more than an

that a crime has been or is about to be committed and that the suspect is a person who committed or is planning the offense." LaFave, *"Street Encounters" and the Constitution. Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39, 75 (1968). *See also* Stern, *supra* note 9, at 536.

[49] "This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances." 392 U.S. at 4.

[50] *See, e.g.*, Untermyer v. Hellbush, 472 F.2d 156 (9th Cir. 1973); Stone v. Patterson, 468 F.2d 558 (10th Cir. 1972); United States v. Parham, 458 F.2d 438 (8th Cir. 1972); State v. Taras, 19 Ariz. App. 7, 504 P.2d 548 (1972); State v. Wicklund, 205 N.W.2d 509 (Minn. 1973); State v. Nichols, 189 Neb. 664, 204 N.W.2d 376 (1973); State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973); Commonwealth v. Tatro, 297 A.2d 139 (Pa. Super. 1972); State v. Gluck, 7 Wash. App. 811, 502 P.2d 1222 (1972).

[51] "Although a pedestrian and an automobile driver are not in identical circumstances, we see no reason why similar Fourth Amendment standards should not be applied in both situations. A person whose vehicle is stopped by police and whose freedom to drive away is restrained is as effectively 'seized' as is the pedestrian who is detained." United States v. Mallides, 473 F.2d 859, 861 (9th Cir. 1973).

[52] 419 F.2d 169 (8th Cir. 1969).

[53] *See* note 16 *supra*, and accompanying text.

[54] For cases with analogous fact situations, see Orricer v. Erickson, 471 F.2d 1204 (8th Cir. 1973); United States v. Brumley, 466 F.2d 911 (10th Cir. 1972).

[55] *See, e.g.*, United States v. Edwards, 469 F.2d 1362 (5th Cir. 1972) (stopping automobile carrying defendant wearing hat similar to that robber was wearing according to description by victim); Stone v. Patterson, 468 F.2d 558 (10th Cir. 1972) (tip from in-

inarticulate hunch or suspicion on the officer's part, the stop is unlawful according to *Terry*.[56] In *Commonwealth v. Pollard*[57] the Pennsylvania Supreme Court held that a detention is unlawful if it is based upon nothing more than the fact that the suspect is in a high crime area, and there is no further evidence indicating that the suspect was committing any suspicious or unlawful act prior to the stop.

The holding in *Terry* has been increasingly applied to situations in which the policeman has received information from a source other than his own observation regarding the alleged criminal activity on the detainee's part.[58] Where the officer has received such information from a previously reliable informant,[59] or from an anonymous telephone tip,[60] or has received a description of the robber from the victim of the robbery which vaguely fits the appearance of the suspect,[61] or has received a radio report vaguely describing the getaway car in a rural bank robbery,[62] courts have held that there is a reasonable basis to stop the suspect and investigate. In *People v. Harris*[63] police received a phone call from an anonymous source which stated that the defendant had narcotics in his possession and gave a description of the defendant and the location from which he would be leaving. Police who were dispatched to the location observed two men, one matching the defendant's description, enter a car parked nearby. Pulling alongside, the policemen announced that they wanted to ask the suspects some questions. The defendant then threw a foil package containing narcotics out of the car window, which the officers seized. The court held that the policemen's actions were reasonable police investigatory functions, noting that case law interpreting *Terry* "has further articulated its application to investigatory detentions."[64]

However, reviewing courts should not wholly rely upon the policemen's knowledge and analysis of the facts and circumstances surrounding the detention in determining its reasonableness. In *State v. Nichols*[65] the Nebraska Supreme Court upheld the stop of the defendant in circumstances disclosing no reasonably suspected current criminal activity on the part of the defendant.

formant and subsequent corroboration of tip regarding defendant's activity by observing officers); United States v. Wickizer, 465 F.2d 1154 (8th Cir. 1972) (car suspiciously parked with two females in back seat in area of recent rape attempts); Wade v. United States, 457 F.2d 335 (9th Cir. 1972) (black male detained at entrance of pedestrian tunnel by officers responding to a dispatch that a black male had just attempted to molest children in the same tunnel); United States v. Zubia-Sanchez, 448 F.2d 1232 (9th Cir. 1971) (appellant's automobile seen discharging passengers along highway immediately before reaching border patrol checkpoint); United States v. Oswald, 441 F.2d 44 (9th Cir. 1971) (description of automobile matching that where marijuana found in trunk).

[56] 392 U.S. at 22.

[57] 450 Pa. 138, 299 A.2d 233 (1973).

[58] *See* Adams v. Williams, 407 U.S. 143 (1972), and notes 100-07 *infra*, and accompanying text.

[59] Stone v. Patterson, 468 F.2d 558 (10th Cir. 1972); United States v. James, 452 F.2d 1375 (D.C. Cir. 1971).

[60] State v. Garcia, 83 N.M. 490, 493 P.2d 975 (App. Ct.), *cert. denied*, 83 N.M. 473, 493 P.2d 958 (1972).

[61] United States v. Edwards, 469 F.2d 1362 (5th Cir. 1972).

[62] United States v. Brumley, 466 F.2d 911 (10th Cir. 1972).

[63] People v. Harris, 43 Mich. App. 531, 204 N.W.2d 549 (1972).

[64] 43 Mich. App. 531, 537, 204 N.W.2d 549, 554 (1972). *See also* United States v. James, 452 F.2d 1375 (D.C. Cir. 1971); Youngblood v. State, 47 Ala. App. 571, 258 So. 2d 913 (1972).

[65] 189 Neb. 664, 204 N.W.2d 376 (1973).

The arresting officers had received radio information from another officer that the defendants were approaching their vicinity. The defendants had been previously stopped by another officer who had obtained their names, descriptions, and auto registration and driver's license numbers. A subsequent radio check disclosed that the defendants had burglary and drug arrest records. The arresting officers, armed with only this information, then stopped the defendants although there had been no traffic violation or suspicious conduct by the defendants prior to the stop. A radio was observed by one officer lying on the floor of the car, and subsequent investigation revealed that the radio had been stolen. The officers knew of no burglary which might have been committed in the vicinity, and one officer even testified that he had stopped the defendants only because they were known burglars. The court upheld their conviction, finding that the officers acted appropriately under the circumstances. Results such as that in *Nichols* indicate that the reasonableness tests of *Terry* must be strongly adhered to by courts, and not completely swallowed by lower court dicta supporting "reasonable investigatory detentions" in all circumstances. Under the standards provided by the Court in *Terry*, such results as *Nichols* clearly sanction denials of fourth amendment rights.[66]

A recent area of controversy in conjunction with *Terry* and the investigatory detention theory has been the police practice of checking drivers' licenses and automobile registration papers in situations in which a stop under *Terry* may be constitutionally impermissible. Many jurisdictions provide statutory authorization of such procedures,[67] and cases upholding the practice are multitudinous.[68] While such procedures are arguably beneficial in keeping unlicensed drivers off the road, they are too often implemented to disguise police investigation of other criminal activity. For instance, in *Palmore v. United States*[69] a District of Columbia policeman observed a car with Virginia rental license plates and stopped the car for a driver's license check, even though the defendant had committed no traffic violation. The defendant's license was valid, but the car rental agreement had expired. With the aid of his flashlight, the officer spotted a pistol, which upon further investigation, proved to be unregistered. The defendant claimed that the check was an unreasonable seizure under *Terry* when he was stopped, due to the policeman's inability to point to any specific facts of suspected criminal activity. The court upheld the policeman's actions

[66] "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . . And simple '"good faith on the part of the arresting officer is not enough." . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate . . . .'" 392 U.S. at 21-22, quoting Beck v. Ohio, 379 U.S. 89, 97 (1964). *See also* United States v. Wilson, 465 F.2d 1290, 1294 (7th Cir. 1972).

[67] *See, e.g.*, D.C. CODE ANN. § 40-301(c) (1967); ILL. REV. STAT. ch. 95½, § 6-112 (1971); N.M. STAT. ANN. § 64-13-49 (1972); OHIO REV. CODE ANN. § 4507.35 (1965); TEX. REV. CIV. STAT. ANN. art. 6687b, § 13 (1969).

[68] *See, e.g.*, Gail v. Municipal Court, 251 Cal. App. 2d 1005, 60 Cal. Rptr. 91 (1967); Garris v. United States, 295 A.2d 510 (D.C. Ct. App. 1972); People v. Francis, 4 Ill. App. 3d 65, 280 N.E.2d 49 (1972); Morgan v. Heidelberg, 246 Miss. 481, 150 So. 2d 512 (1963); People v. Russo, 38 Misc. 2d 957, 239 N.Y.S.2d 370 (1963); Cuyahoga Falls v. Church, 10 Ohio App. 2d 9, 225 N.E.2d 274 (1967); State v. Campbell, 95 R.I. 370, 187 A.2d 543 (1963); Leonard & Turner v. State, 496 S.W.2d 576 (Tex. Crim. App. 1973).

[69] 290 A.2d 573 (D.C. Ct. App. 1972).

in finding that the license check was not an unreasonable procedure. A definitive ruling in this area may soon be forthcoming, as *Palmore* is currently pending in the United States Supreme Court with a determination of whether probable jurisdiction exists being postponed until a hearing of the case on the merits.[70]

In Texas, until recently, few decisions by the Texas Court of Criminal Appeals had dealt with the validity of the "stop" stage of police investigative procedures. While holdings of the court prior to 1972 had cited *Terry* in justifying policemen's actions in conducting on-the-street investigations, these cases primarily were concerned with the validity of the arrests which followed the initial confrontations.[71] More unusual is a holding in which *Terry* was cited to justify the initial stages of an investigation of a parked automobile. In *Onofre v. State*[72] the court held that a policeman's actions in approaching and shining his flashlight into the defendant's auto parked behind a lounge after closing time, and discovering marijuana on the seat, were constitutionally proper. The defendant contended that because probable cause was lacking, the shining of the flashlight into the automobile constituted an illegal search. The court agreed that probable cause did not exist, but held that the policeman's methods and the surrounding circumstances were appropriate for an investigation of suspected criminal activity under *Terry*. "As in *Terry*," the court said, "the officers here were discharging a 'legitimate investigative function' when they approached the appellant's automobile."[73]

B. *The Frisk for Weapons*

Besides granting the authority to "stop," *Terry* recognized that in appropriate circumstances, the policeman may conduct a pat-down of the suspect for weapons. This authority to frisk does not arise automatically, concomitant to the authority to stop.[74] Rather, a policeman may frisk only in circumstances in which a "reasonably prudent man . . . would be warranted in the belief that his safety or that of others was in danger."[75] Further, the policeman "must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous."[76] The Court has noted the potential for abuse inherent in the authority to frisk,[77] and *Sibron* and other decisions have illustrated that this authority may not be improperly implemented to disguise a warrantless search where probable cause is lacking.[78]

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[70] 409 U.S. 1055 (1973).

[71] Barrientes v. State, 462 S.W.2d 292 (Tex. Crim. App. 1971); Carter v. State, 445 S.W.2d 747 (Tex. Crim. App. 1969); Cox v. State, 442 S.W.2d 696 (Tex. Crim. App. 1969).

[72] 474 S.W.2d 699 (Tex. Crim. App. 1972).

[73] *Id.* at 701.

[74] United States v. Cunningham, 424 F.2d 942, 943 (D.C. Cir.), *cert. denied*, 399 U.S. 914 (1970).

[75] Terry v. Ohio, 392 U.S. 1, 27 (1968).

[76] Sibron v. New York, 392 U.S. 40, 64 (1968).

[77] 392 U.S. at 13-15; *see* note 44 *supra.*

[78] *See* United States v. Johnson, 463 F.2d 70 (10th Cir. 1972); United States v. Collins, 439 F.2d 610 (D.C. Cir. 1971); United States v. McIntyre, 304 F. Supp. 1244 (E.D. La. 1969); Cunha v. Superior Court, 2 Cal. 3d 352, 466 P.2d 704, 85 Cal. Rptr. 160 (1970); People v. Bremmer, 30 Cal. App. 3d 1058, 106 Cal. Rptr. 797 (1973); People v. Navran, 483 P.2d 228 (Colo. 1971).

A troublesome question has been: at what point will the apparent danger presented to the investigating officer by the suspect be constitutionally sufficient to warrant the initiation of a frisk?[79] While courts have placed great importance on the appearance of circumstances as observed by the frisking officer, it is clear that the frisk will not be upheld where it is unreasonable to believe any potential danger is present.[80] In *United States v. Lopez*[81] a federal district court noted the absence of adequate standards in this area and offered guidelines for determining whether this level of dangerousness exists. It stated that the reviewing court must first determine the objective evidence available to the policeman at the time of the frisk and the level of probability that the suspect was armed and dangerous. The court must then determine whether these factors justified the frisk in light of the manner and methods of the frisk and the possible risk to the officer and the community if the individual is not disarmed at once.[82]

The "frisk" doctrine of *Terry* and *Sibron* has been going through a judicial metamorphosis in recent years in regard to the specific thing or place to be the subject of the protective search. A technical reading of *Terry* and *Sibron* seems to authorize only limited frisks of the individual's person for weapons in instances where probable cause to arrest or search is lacking.[83] However, since 1968, the decision's protective search for weapons rationale has been applied to uphold searches involving more varied fact situations, including searches of automobiles[84] and even the contents of a glove compartment.[85] In *United States v. Berryhill*[86] the Ninth Circuit upheld the validity of a search of a handbag belonging to the defendant's wife, who was riding in the automobile with the defendant at the time of his arrest. The court acknowledged that no known authority existed that authorized an automatic personal search of a companion of the arrestee present at the time and place of the arrest. However, applying the frisk rationale of *Terry*, the court said, "We think that *Terry* recognizes and common sense dictates that the legality of such a limited intrusion into a citizen's personal privacy extends to a criminal's companions at the time of arrest."[87]

The sequence of procedures which *Terry* authorized has since been the subject of further refinement by courts. There is a heavy inference in *Terry* that the authority to frisk can only arise following a reasonable investigation and

[79] *See* Cook, *The Art of Frisking*, 40 FORDHAM L. REV. 789, 794-98 (1972).

[80] *E.g.*, in United States v. Johnson, 463 F.2d 70 (10th Cir. 1972), it was held that evidence obtained as the result of a frisk following the stop of the defendant for driving with a noisy muffler was inadmissible since there was a complete absence of circumstances revealing potential danger. *Cf.* United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969).

[81] 328 F. Supp. 1077 (E.D.N.Y. 1971).

[82] *Id.* at 1097.

[83] "We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." 392 U.S. at 30.

[84] United States v. Preston, 468 F.2d 1007 (6th Cir. 1972).

[85] State v. Zantua, 8 Wash. App. 47, 504 P.2d 313 (1972).

[86] 445 F.2d 1189 (9th Cir. 1971).

[87] *Id.* at 1193. *See also* United States v. Del Toro, 464 F.2d 520 (2d Cir. 1972), which upheld the validity of a pat-down of a suspected armed companion of the arrestee.

inquiry by the suspecting officer. However, in *United States v. Pleasant*[88] the Eighth Circuit held that initial inquiries by investigating officers were not necessary requirements which must be fulfilled before an officer can conduct a protective search. There, officers acting on the basis of outside information boarded a bus and arrested the defendant. The defendant thereupon reached for a shotgun wrapped in a sweater in the baggage rack above. Police seized the gun, and later at trial admitted the gun into evidence. The Eighth Circuit determined that no probable cause existed to justify the defendant's initial arrest. The defendant thereupon claimed that the subsequent seizure of the shotgun was improper as a search incident to an unlawful arrest. The court disagreed however with this contention, and held that the seizure of the gun under the circumstances was permissible under *Terry* as a valid protective search. While noting that a narrow reading of *Terry* lends itself to the interpretation that reasonable inquiries are necessary prior to such a search, the court stated that, nevertheless, application of the *Terry* ruling depends upon the peculiar facts presented in each case, and that in *Pleasant* the officer was acting reasonably to protect his and others' safety in seizing the weapon from the defendant.[89]

The chief area of misapplication of *Terry*'s protective search doctrine in Texas has been in the category of minor traffic violations. As pointed out previously, technically *Terry* and *Sibron* pertain solely to frisks of the individual's person where probable cause to arrest is lacking. The Texas Court of Criminal Appeals, however, has cited the two decisions on occasion to justify a wide-scale search of an automobile or its occupants incident to an "arrest" for a traffic offense. Of course, questions have arisen before concerning the constitutionality of searches of automobiles incident to arrests for minor traffic violations.[90] For instance, it is highly speculative whether the issuance of a traffic citation constitutes an "arrest" of the type contemplated to initiate a full-scale search for weapons and contraband. Likewise, the scope of such a search remains undefined. While the Supreme Court has never directly considered whether an automobile or its occupant may be searched incident to a traffic arrest where weapons or destructible evidence are not likely to be present,[91] Texas decisions have held that such searches are permissible. In *Lane v. State*[92] a police officer stopped the defendant for speeding, ordered him to step from his vehicle, and searched the automobile, discovering an illegal weapon in the glove compartment. The court of criminal appeals held that probable cause was not required to search the vehicle, because the search was incidental to the arrest, and that no authority existed which limited the scope of such a search. Other opinions by the court of criminal appeals have upheld such unlimited searches where the defendant appeared nervous when stopped,[93]

[88] 469 F.2d 1121 (8th Cir. 1972).
[89] *Id.* at 1124-25.
[90] *See* Comment, *The Law of Arrest in Texas*, 17 BAYLOR L. REV. 303, 321 (1965).
[91] *See* Annot., 26 L. Ed. 2d 893 (1971). The Supreme Court will rule on the question during its next term, however. State v. Gustafson, 258 So. 2d 1 (Fla. 1972), *cert. granted*, 410 U.S. 982 (1973) (No. 71-1669); United States v. Robinson, 471 F.2d 1082 (D.C. Cir. 1972), *cert. granted*, 410 U.S. 982 (1973) (No. 72-936).
[92] 424 S.W.2d 925 (Tex. Crim. App. 1967), *cert. denied*, 392 U.S. 929 (1968).
[93] Pace v. State, 461 S.W.2d 409 (Tex. Crim. App. 1970).

or it appeared that the defendant was attempting "to hide something" in his automobile.[94] The Fifth Circuit and courts in other jurisdictions have, however, invalidated similar exploratory searches incident to traffic arrests by grounding their holdings on the principle that, absent special circumstances, a vehicle search which is not related to the nature of the offense for which the arrest was made is *per se* unconstitutional.[95]

The decisions in *Terry* and *Sibron* have thus become additional, valuable weapons in the prosecution's arsenal in justifying full-scale searches incident to traffic arrests. For instance, in *Corbitt v. State*[96] the defendant was stopped and arrested for speeding, and the arresting officer observed he was intoxicated. The officer then searched the automobile and discovered illegal drugs. The court of criminal appeals upheld the search and additionally justified it on "the need for the officer's protection," citing *Terry*.[97] In *Mitchell v. State*[98] the defendant was stopped for running a red light, and when the officer approached, he "leveled a barrage of abusive language" upon the officer. The officer then searched the car and the defendant, finding marijuana in his pocket. The court held that the search was valid because the officer had reason to fear for his safety, citing *Terry*. Similar reference to *Terry* and *Sibron* appears in other court of criminal appeals decisions regarding searches incident to traffic arrests.[99] In light of these cases, it is submitted that searches of automobiles incident to arrests for traffic offenses lie outside the intended scope of reasonable searches for weapons of *Terry* and *Sibron*, and their holdings should not be applied to circumstances where probable cause to arrest or search existed in the first place.

IV. REDEFINITION AND SHIFT

Certain decisions handed down in 1972 and 1973 by the United States Supreme Court and by the Texas Court of Criminal Appeals represent further refinement and utilization of the doctrine in *Terry* and are deserving of special consideration and analysis.

Adams v. Williams.[100] A police officer patrolling in a high crime area of Bridgeport, Connecticut, in the early morning was approached by an individual who informed him that a person parked nearby in his automobile was carrying narcotics and had a gun at his waist. The officer approached the automobile in

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[94] Adair v. State, 427 S.W.2d 67 (Tex. Crim. App. 1967).

[95] Pace v. Beto, 469 F.2d 1389 (5th Cir. 1972); Amador-Gonzales v. United States, 391 F.2d 308 (5th Cir. 1968); Grundstrom v. Beto, 273 F. Supp. 912 (N.D. Tex. 1967); United States v. Tate, 209 F. Supp. 762 (D. Del. 1962); People v. McReynolds, 8 Cal. 3d 655, 504 P.2d 915, 105 Cal. Rptr. 691 (1973); People v. Superior Court, 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970); People v. Ellis, 53 Ill. 2d 390, 292 N.E.2d 728 (1973); People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433 (1960); Thompson v. State, 487 P.2d 737 (Okla. Crim. 1971).

[96] 445 S.W.2d 184 (Tex. Crim. App. 1969).

[97] *Id.* at 186.

[98] 482 S.W.2d 223 (Tex. Crim. App. 1972).

[99] Grego v. State, 456 S.W.2d 123 (Tex. Crim. App. 1970); Oliver v. State, 455 S.W.2d 291 (Tex. Crim. App. 1970); Sarabia v. State, 455 S.W.2d 231 (Tex. Crim. App. 1969), *cert. denied*, 399 U.S. 934 (1970).

[100] 407 U.S. 143 (1972).

which Williams was sitting, tapped on the window, and asked Williams to open his door. Williams instead rolled down the window, whereupon the officer reached into the car and removed a pistol from Williams' waistband. The officer arrested Williams and then searched the auto, discovering heroin. The Second Circuit, granting Williams' petition for habeas corpus relief following his conviction, held that the officer's action constituted an invalid search of his person and his auto.[101]

The Supreme Court determined in *Adams v. Williams* that the officer's conduct did not constitute an unreasonable search, but rather was an appropriate protective response under the doctrine of *Terry*. The informant's tip was found to have contained "enough indicia of reliability" to justify the stop, although the Court noted that the same information would have failed the reliable-credible test of *Spinelli v. United States*[102] and *Aguilar v. Texas*[103] for an arrest or search warrant.[104] In justifying the "frisk," the court found that the officer's actions were reasonable for his self-protection in light of the circumstances presented: the high crime rate in the area, the fact that Williams was sitting in an automobile, and the fact that Williams rolled down the window instead of opening the door as requested.[105] The seizure of the gun, the Court said, gave the officer probable cause to arrest Williams for illegal firearms possession.

At first glance the opinion seems to reflect a basic shift from *Terry*. In *Terry* the policeman had acted on the basis of his personal observations, scrutinizing the suspicious conduct before interference; *Williams* indicates that an officer may stop and frisk solely on the basis of unreliable hearsay. The experience, or trained eye, of the policeman in spotting potential criminal activity, so relevant a factor in *Terry*, seems no longer important. In *Williams* the information received by the officer failed to constitute probable cause to arrest the defendant, but, as *Terry* held, probable cause is not required to detain a suspect for investigation. Following the "stop," the question remaining was whether the officer reasonably feared for his safety to justify the frisk. The Court, however, failed to consider this important question. *Sibron* held that in order for a policeman to initiate the frisk of a suspect, he must be able to point to particular facts from which he can reasonably infer that the suspect is armed, and that human safety is jeopardized.[106] Because a frisk constitutes a greater invasion of personal privacy than a "stop," the Court should have more carefully scrutinized the question whether the policeman in *Williams* should have

[101] Williams v. Adams, 441 F.2d 394 (2d Cir. 1971).

[102] 393 U.S. 410 (1969).

[103] 378 U.S. 108 (1964). The Supreme Court in *Aguilar* and *Spinelli* held that a search and seizure cannot be justified on the basis of conclusory allegations of an unnamed informant, unless the informant can be shown to have been reliable in his previous dealings with the police and the information includes the underlying circumstances upon which the informant based his conclusions regarding the defendant's alleged criminal activity. The information received must meet this two-pronged test in order for there to be probable cause to justify the issuance of a search or arrest warrant by a magistrate.

[104] 407 U.S. at 147.

[105] *Id.* at 147-48. It is interesting to note that one author foresaw the difficulties that would be present in applying *Terry* to the case of a suspect seated in a vehicle. He implied that more potential for danger exists in these circumstances than in those involved in a pedestrian-to-pedestrian on-the-street detention as in *Terry*. LaFave, *supra* note 48, at 90.

[106] *See* notes 74-76 *supra*, and accompanying text.

relied more upon his personal observations and less on hearsay to initiate the frisk.[107] As it stands, *Williams* implies that the authority to frisk may arise automatically with the authority to stop, a result obviously not desired by the Court in *Terry*.[108]

It is interesting to note that in Texas the officer's conduct in *Williams* could be justified completely by statutory authority to arrest. Article 487 of the Penal Code provides that a peace officer may arrest without warrant any person unlawfully carrying firearms, and that the officer himself may be fined $500 for refusing to arrest such violator "upon information from some reliable person."[109] Moreover, article 14.04 of the Code of Criminal Procedure provides that where a peace officer is shown by satisfactory proof, "upon the representation of a credible person" that a felony has been committed and "there is no time to procure a warrant," the officer may arrest the suspect without warrant.[110] Questions of constitutional construction again arise. The provisions both authorize arrest in circumstances which *Terry* and *Williams* held would only be appropriate for stop-and-frisk, because probable cause to arrest was lacking.

Brown v. State.[111] An officer on patrol in downtown Dallas about 1:30 a.m. noticed an automobile with out-of-state license plates traveling ahead of him. The officer had investigated a supermarket robbery the previous day, in which the three robbery participants had been generally described. He pursued and observed four men in the auto, three of whom he determined fitted the general description of the robbery participants. He then observed the two men in the back seat moving their shoulders, which he interpreted as signifying the concealment of firearms. The suspects stopped voluntarily, asking the officer the reason for his pursuit. More patrolmen arrived and the suspects were searched. A search of the automobile followed, revealing ammunition and a small package of marijuana. A search of the trunk revealed weapons. The defendants were charged and convicted solely of possession of marijuana. The court of

[107] "[A frisk] is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." 392 U.S. at 17. The Court in *Williams* initially rejected the defendant's contention that a stop and frisk must be grounded solely upon the officer's personal observations. While the kinds of on-the-street information an officer will receive will vary in value and reliability, the Court found that in *Williams* the information was of the type to warrant an "appropriate police response." 407 U.S. at 147.

[108] 392 U.S. at 28-30; *see* United States v. Cunningham, 424 F.2d 942 (D.C. Cir.), *cert. denied*, 399 U.S. 914 (1970).

Adams v. Williams, 407 U.S. 143 (1972), has already been cited as controlling in many subsequent decisions upholding police searches of suspects. In United States v. Pleasant, 469 F.2d 1121 (8th Cir. 1972), the court noted the expansion of *Terry* through *Williams* in upholding the seizure of a weapon from a suspect where probable cause to arrest did not exist. The defendant claimed that reasonable inquiries and investigation were required by the police before the seizure under *Terry*. The court stated, "While a reading of *Terry* lends itself to this interpretation, the later Supreme Court case of *Adams v. Williams* has, in our view, expanded upon the language of Terry," and held that the seizure was, thus, proper under *Williams*. 469 F.2d at 1124. *See* notes 88-89 *supra*, and accompanying text. *See also* Untermyer v. Hellbush, 472 F.2d 156 (9th Cir. 1973); United States v. Ragsdale, 470 F.2d 24 (5th Cir. 1972); United States v. Edwards, 469 F.2d 1362 (5th Cir. 1972); State v. Nichols, 189 Neb. 664, 204 N.W.2d 376 (1973).

[109] TEX. PEN. CODE ANN. art. 487 (1952); *see* Alexander v. State, 458 S.W.2d 656 (Tex. Crim. App. 1970).

[110] TEX. CODE CRIM. PROC. ANN. art. 14.04 (1966).

[111] 481 S.W.2d 106 (Tex. Crim. App. 1972).

criminal appeals reversed, finding that there was no probable cause to arrest or search, and that the circumstances were not proper for an investigative stop under *Terry*.

The holding in *Brown* is significant for two reasons. First, the decision illustrates the court of criminal appeals' increasing recognition of the doctrine in *Terry*.[112] The second item of significance concerns the court's language. The court stated that "three classes of probable cause" exist to justify a government intrusion: "probable cause to arrest, probable cause to search and probable cause to investigate."[113] In determining the validity of the "stop" of the defendants, the court found that "this chain of inferences is too tenuous to establish probable cause for an investigative stop."[114] These statements can be interpreted in two ways: (1) the court meant to use a more general term, such as "reasonable grounds," or "reasonable belief" instead of the judicially-defined "probble cause,"[115] or (2) the language is to be interpreted literally.

"Probable cause" implies a higher degree of incriminating circumstances pointing to criminal activity than does "reasonable suspicion."[116] *Terry* held that probable cause need not exist to justify an investigative stop. Yet, if this dicta in *Brown* is taken at face value, then probable cause must be present to warrant a forcible detention in Texas. Also, the court's portrayal of probable cause as divided into three "classes" is dangerous language. To proceed from that premise and assert that less is required to find "probable cause to investigate" than to find "probable cause to arrest" would only further confuse an already vague standard.

Talbert v. State.[117] A police officer on patrol at approximately 2:00 a.m. in Austin spotted an automobile stopped alongside the curb of a street located near the University of Texas campus. He observed a man enter the automobile and then the automobile slowly drive away. The officer pursued the vehicle for a distance and then stopped it to investigate further. No traffic violations were observed, nor did it appear that the automobile's occupants were intoxicated or driving unsafely, but the officer later testified that the occupants were driving in a "high crime area" and he was merely checking to see whether everything was in order. The officer asked for identification from the occupants and then radioed in for a warrant check. Upon returning to the stopped automobile, the officer spotted a brown paper sack on the seat. Closer inspection revealed that the sack contained marijuana. The occupants were convicted for unlawful possession of marijuana. The defendants contended that there

[112] *See also* Hensley v. State, 494 S.W.2d 816, 818 (Tex. Crim. App. 1973) (Odom J., dissenting); Fry v. State, 493 S.W.2d 758 (Tex. Crim. App. 1973); Baker v. State, 478 S.W.2d 445, 449 (Tex. Crim. App. 1972); Onofre v. State, 474 S.W.2d 699 (Tex. Crim. App. 1972).

[113] 481 S.W.2d at 109-10.

[114] *Id.* at 112.

[115] The court of criminal appeals elsewhere has said "probable cause" when they could have arguably meant "reasonable grounds." *E.g.*, in Lara v. State, 469 S.W.2d 177, 179 (Tex. Crim. App. 1971), *cert. denied*, 404 U.S. 1040 (1972), the court held that the police officers "had *probable cause to be suspicious* and the arrest was authorized under Art. 14.03 . . . ." (Emphasis added.)

[116] *See* note 2 *supra*.

[117] 489 S.W.2d 309 (Tex. Crim. App. 1973).

was no justification for the stop of the automobile. The court of criminal appeals agreed with the defendants and indicated their unwillingness to "blanket-label" a substantial portion of a city as a high crime area to justify the stop of the automobile in the circumstances presented. The court noted that the officer's suspicion was the sole reason for his stopping the automobile, and that "the inarticulate hunch, suspicion, or good faith of an arresting officer is insufficient to constitute probable cause for an arrest, search, or temporary detention."[118] Further, the court held that the "facts presented simply do not furnish probable cause to stop and arrest under Article 14.03 [of the Code of Criminal Procedure] . . . ."[119] A comparison was made with *Brown v. State*,[120] with the court noting that *Brown* 'is factually much stronger than the instant case, yet was reversed because of a lack of probable cause." To find an absence of probable cause in *Brown* and then to determine that probable cause existed in *Talbert* would be "wholly inconsistent" according to the court.

While as in *Brown*, the court in *Talbert* was technically guilty of misuse of the term "probable cause," it is submitted that the result in *Talbert* is constitutionally correct and, further, evidences not only the court of criminal appeals' increasing awareness of the doctrine of *Terry*, but also presumably its increasing reluctance to rely solely upon outdated statutory authority such as article 14.03 to justify constitutionally unwarranted government intrusions.

V. CONCLUSION

In assessing the impact of *Terry* since 1968 it must be concluded that the decision has in some instances expanded law enforcement in the area of governmental intrusions under the fourth amendment. A brief investigatory detention of a suspect prior to *Terry* was arguably an arrest, thus requiring probable cause to be valid; today, because of *Terry*, such a detention is subject to a lesser degree of judicial scrutiny, and often receives only passing treatment by the reviewing courts. The frisk procedures authorized by *Terry* have undergone judicial expansion as well. Today the doctrine of the protective search of a suspect for weapons, applicable in *Terry* and *Sibron* to pat-downs of the suspect's outer clothing, has been held applicable to searches of persons and things well outside the scope of the suspect's personage, such as automobiles and companions of the suspect. While application of *Terry*'s doctrine should not be restrictively limited to on-the-street pedestrian-to-pedestrian encounters only, it is submitted that courts should place less emphasis upon *Terry* in determining cases in which other decisions would be more analogously applicable to the existing fact situation. For instance, if the fact situation of a case deals with the search of an automobile following a minor traffic violation, certainly decisions regarding automobile searches[121] are logically more

[118] *Id.* at 311.

[119] *Id.*

[120] *See* note 111 *supra*, and accompanying text.

[121] *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Carroll v. United States, 267 U.S. 132 (1925); Fry v. State, 493 S.W.2d 758 (Tex. Crim. App. 1973); Stoddard v. State, 475 S.W.2d 744 (Tex. Crim. App. 1972).

applicable and should be more controlling in determination than cases dealing with the frisk of a suspicious pedestrian.

However, the need for police investigative procedures such as stop-and-frisk cannot be denied if society is to have effective means of prevention, detection, and apprehension of criminal activity. A most laudable aspect of *Terry* is the decision's promotion of flexible, constitutional police responses to the variety of situations that are presented to law enforcement officers; an inflexible standard of probable cause demanding the same evidence no matter what kind of police action is involved is neither warranted nor desirable in situations which amount to lesser intrusions of the person or his property than an arrest or a comprehensive search. This singular aspect of *Terry* perhaps explains its frequent appearance as an authority in cases with fact situations dealing with a wide spectrum of police conduct besides a technical stop-and-frisk. In Texas, for instance, the decision has received increased recognition in recent court of criminal appeals decisions. It is submitted that this development can be attributed to two probable factors: (1) the doctrine of *Terry* and stop-and-frisk as a valuable tool for law enforcement is finding favor in the Texas courts, and (2) the prosecution is becoming more reluctant to rely solely on statutory authority to arrest, due to its often questionable constitutional validity.

To prevent further encroachment upon fourth amendment standards through *Terry*, reviewing courts should not be discouraged from formulating more refined and practical standards for a stop-and-frisk, as was attempted in *United States v. Lopez*.[122] But it should foremost be remembered that the practices authorized by *Terry* do not arise automatically without limitations, but are subject to the reasonableness standard under the fourth amendment. If the doctrine of stop-and-frisk which has evolved since 1968 is kept within these confinements, the balance between the interests of crime prevention and the individual's interests to be free from unreasonable governmental intrusions may be effectively struck. If, however, more substantial erosion of the doctrine is permitted by non-vigilant courts, a "long step down the totalitarian path" will be truly accomplished, as Justice Douglas warned the majority in 1968.[123]

[122] 328 F. Supp. 1077 (E.D.N.Y. 1971); *see* notes 81-82 *supra*, and accompanying text.
[123] 392 U.S. at 38.